No. 19-14096

United States Court of Appeals for the Eleventh Circuit

OSCAR INSURANCE COMPANY OF FLORIDA,

Plaintiff-Appellant,

v.

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC. ET AL.,

Defendants-Appellees,

Appeal from the United States District Court for the Middle District of Florida, No. 6:18-cv-01944 (Byron, J.)

BRIEF FOR AMICI CURIAE ANTITRUST, LAW & ECONOMICS SCHOLARS RICHARD A. EPSTEIN, BOWMAN J. HEIDEN, JUSTIN (GUS) HURWITZ, JONATHAN KLICK, THOMAS LAMBERT, GEOFFREY A. MANNE, MURAT C. MUNGAN, JOSHUA D. WRIGHT, AND JOHN M. YUN IN SUPPORT OF APPELLEES

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FEBRUARY 25, 2020

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, counsel for Amici Curiae Richard Epstein et al. provides the following Certificate of Interested Persons:

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Counsel certifies that no publicly traded company or organization is known to have an interest in the outcome of this case or appeal.

February 25, 2020

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INTEREST OF AMICI CURIAE

Amici curiae are scholars of antitrust, law, and economics at leading universities and research institutions across the United States.[1] They are listed in the addendum. *Amici* have an interest in the development of federal antitrust jurisprudence, including the question presented in this appeal regarding the reach of the federal antitrust laws. While *amici* have varying views about whether the McCarran-Ferguson Act is good policy, *amici* have a shared interest in the proper interpretation of the Act's text enacted by Congress long ago, which leaves "the business of insurance" for the States to regulate primarily. That text necessarily encompasses the exclusive agency arrangements at issue in this appeal. Such vertical arrangements are not only "the business of insurance" but also offer procompetitive benefits. If any scrutiny of these vertical arrangements were necessary, the Act leaves that task to the States. To instead hold that these vertical arrangements are sufficient to trigger federal antitrust litigation would transform the antitrust laws from a shield against anticompetitive behavior into a sword, weaponizing competitors to sue over what is in fact procompetitive behavior by other competitors.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party or person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The views expressed herein are those of the named *amici* and not the institutions with which they are affiliated.

STATEMENT OF THE ISSUES

1. Whether "the business of insurance" includes an insurer's chosen means of selling insurance policies using a network of exclusive agents.

2. Whether contracting with agents to sell exclusively the insurer's policies amounts to an "act of boycott, coercion, or intimidation," even though the exclusivity requirement is part of the insurer's purely vertical distribution arrangement and even though there remain multiple routes to purchase insurance from other insurers.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

More than seven decades ago, Congress spoke unequivocally: with limited exceptions, "the business of insurance" would be policed by state regulatory bodies, not the federal antitrust laws. 15 U.S.C. § 1012. But now, Appellant (and antitrust scholars as *amici*) urge this Court to overlook that clear prescription. They invite the Court to conclude, against the McCarran-Ferguson Act's textual command and binding circuit precedent, that an insurer's chosen means of distributing insurance through exclusive agents—one of the insurer's key structural decisions—is somehow not part of "the business of insurance." The Court should decline that invitation.

Florida Blue enlists a network of insurance agencies to sell health insurance policies to individuals and families. To be part of the network, an agency must agree to sell exclusively Florida Blue products. Some agencies will accept Florida Blue's offer, and in exchange they will receive marketing support, training, and other benefits. Others will decline, opting to remain independent so that they may sell from a larger pool of

other insurers' policies in order to reach a broader portion of the market. There is no *a priori* reason to think that one type of arrangement is superior to the other, and no reason for any court to cast the pall of treble damages to the practitioners of the first of these arrangements.

Given this background, Florida Blue's exclusive agency arrangement is plainly "the business of insurance" as that term is used in the McCarran-Ferguson Act. 15 U.S.C. § 1012(b). Both the Act's text and history confirm this. It was Congress's response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). The *South-Eastern Underwriters* conspirators "fixed premium rates and agents' commissions," "employed boycotts together with other types of coercion and intimidation to force non-member insurance companies into the conspiracies," and refused to permit independent sales agents to represent the conspirator insurance companies. *Id.* at 535-36. Departing from decades of precedent, the Supreme Court ruled the federal antitrust laws reached such conduct.

Following *South-Eastern Underwriters*, Congress restored the expectation that the States would primarily regulate "the business of insurance"—that is commercial transactions involving insurance. With the McCarran-Ferguson Act, Congress generally exempted insurance-related transactions from federal antitrust scrutiny so long as the States continue to regulate. Applied here, it is hard to imagine anything more quintessentially "the business of insurance" than the means by which Florida Blue chooses to distribute its insurance policies.

To be sure, Congress did not overrule *South-Eastern Underwriters* entirely. Congress legislated an exception permitting federal suits for "agreement[s] to boycott, coerce, or intimidate, or act[s] of boycott, coercion, or intimidation," even if involving the business of insurance. *Id.* § 1013(b). That exception merely tracks certain allegations in *South-Eastern Underwriters*—those involving "boycotts, coercion and intimidation" by the group of insurers and other co-conspirators working collusively against insurers and others not part of their conspiracy. 322 U.S. at 535-36. By enacting that exception, Congress acknowledged the *South-Eastern Underwriters* concern that federal antitrust laws ought not be wholly inapplicable, but nonetheless ought to be limited in their application. Only this narrower set of cases would receive federal scrutiny, not all allegedly anticompetitive conduct. Applied here, a bilateral agreement with an exclusivity clause is a far cry from the cartel-like conduct in *South-Eastern Underwriters*. Enforcement of that exclusivity clause is not coercive and thus does not fall within the McCarran-Ferguson Act's exception.

Appellant and *amici* reject this common-sense reading of the statute and ask to upset the balance Congress created more than 70 years ago. They proclaim that "the business of insurance" is limited to conduct unique to the insurance industry. And an exclusivity requirement, so goes the argument, is not sufficiently unique, even though it is the very means by which Florida Blue markets, sells, and executes insurance policies with its customers. In the alternative, they proclaim that whatever "the business of insurance" means, Florida Blue cannot escape federal antitrust scrutiny because the

exclusivity requirement is coercive. According to *amici*, an insurer's refusal to work with an agent who rejects the exclusivity requirement is paradigmatic coercion. *See* Hovenkamp Br. 24. Coercion, if so broadly defined, would capture nearly any exclusivity requirement, not only by insurers but also, by implication, exclusive arrangements across other industries.

There are myriad ways to distribute insurance to individuals and families—direct to consumer, through the federal government's health insurance exchange, through independent brokers, or through agents working exclusively for a single insurer, among others.[2] Any one of these distribution channels has both benefits and drawbacks. The last of these—agents selling exclusively for a single insurer—is not only lawful but also provides various procompetitive advantages, as is the case with many vertical arrangements. In exchange for exclusivity, Florida Blue invests millions to support its network of agents with advertising and marketing funds, training, workshops, conferences, and beyond. That, in turn, results in a more sophisticated sales force that ultimately benefits consumers. Florida Blue's exclusivity requirement is, at worst, neutral and, at best, procompetitive. Neither it nor other vertical arrangements should be presumed to be anticompetitive, let alone "coercive" under the McCarran-Ferguson Act's even narrower exception.

[2] *See* Baker Decl. ¶¶ 15, 165, 205, *Oscar Ins. Co. of Fla. v. Blue Cross and Blue Shield of Fla.*, No. 6:18-cv-1944 (M.D. Fla. Jan 18, 2019), ECF No. 62-3.

ARGUMENT

For more than 30 years, Florida Blue has opted to sell insurance to individuals and families through a network of insurance agencies selling exclusively Florida Blue policies. This chosen means of distributing insurance is plainly "the business of insurance," and it is not "coercive." The McCarran-Ferguson Act thus excludes these arrangements from federal antitrust scrutiny. 15 U.S.C. §§ 1012(b), 1013(b). The District Court's dismissal of Appellant's complaint should be affirmed.

I. An Insurer's Distribution Network Is Quintessentially "The Business Of Insurance."

A. Text and history inform the meaning of "the business of insurance."

Until 1944, regulation of the insurance industry was beyond Congress's reach. Beginning with *Paul v. Virginia*, the Supreme Court recognized that "[i]ssuing a policy of insurance is not a transaction of commerce." 75 U.S. (8 Wall.) 168, 183 (1868); *accord N.Y. Life Ins. Co. v. Deer Lodge Cnty.*, 231 U.S. 495, 502-11 (1913) (discussing forty-five years of Supreme Court precedent holding the same). Then came *South-Eastern Underwriters*.

The particular facts of *South-Eastern Underwriters* are instructive, for those facts prompted Congress to respond with the statutory text now at issue in this appeal. In *South-Eastern Underwriters*, federal prosecutors indicted member companies of the South-Eastern Underwriters Association for conspiring to violate the antitrust laws. 322 U.S. at 535-36. The indictment alleged the member companies fixed premium rates, fixed

agents' commissions, refused to allow independent agencies representing non-member companies to also represent the member companies, and threatened boycotts from persons purchasing insurance from non-member companies, among other allegations. *See id.* The conspirators then established inspection and rating bureaus and insurance boards to police and maintain the conspiracies. *See id.* at 536. The defendants moved to dismiss the indictment on the ground that the Sherman Act did not apply to defendants' conduct—the business of insurance. *See id.* The Supreme Court disagreed. The Court concluded that insurance could be "commerce" for purposes of Congress's commerce power and that the Sherman Act therefore could be applied to the indicted conduct. *See id.* at 552-59.

In response, Congress enacted the McCarran-Ferguson Act. Relevant here, the Act contains a reverse preemption provision confirming that the States will remain the primary regulators of the insurance markets. That same provision removes the business of insurance from federal antitrust scrutiny so long as such business is regulated by the State:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That … the Sherman Act … shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012(b). Congress also enacted an exception. With respect to acts of "boycott, coercion, or intimidation," the Sherman Act could apply:

> Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Id. § 1013(b). Simply put, the McCarran-Ferguson Act largely restored the federalism balance as it was before *South-Eastern Underwriters*.

Against that historical backdrop, we return to the first question presented: what Congress meant by exempting "the business of insurance" from federal antitrust scrutiny. As it is used in the Act, "the business" refers to "[m]ercantile transactions,"[3] or "commercial transactions."[4] The term "insurance" refers generally to the "contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event,"[5] and can also include "the business of making such contracts."[6] Combining the two, "the business of insurance" means those commercial transactions involving contracts shifting risk from the insured to the insurer. *See*, *e.g.*, *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1331 (11th Cir. 2004) (identifying "[r]ate-making and the performance of contractual obligations" as "fundamental to the business of insurance"); *Thompson v. N.Y. Life Ins.*, 644 F.2d 439, 442-43

[3] "Business," WEBSTER'S NEW INT'L DICTIONARY 362 (2d ed. 1934).
[4] "Business," BLACK'S LAW DICTIONARY (11th ed. 2019).
[5] "Insurance," BLACK'S LAW DICTIONARY (3d ed. 1933).
[6] "Insurance," WEBSTER'S NEW INT'L DICTIONARY 1289 (2d ed. 1934).

(5th Cir. 1981) ("selling and advertising of policies and the licensing of companies and their agents are also within the scope of the statute"); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 781 (1993) ("'the business of insurance' should be read to single out one activity from others, not to distinguish one entity from another"). The exclusive agency arrangements at issue here fall squarely within that definition. They are the means by which Florida Blue sells its insurance policies to individuals and families.

This Court should reject Appellant and *amici*'s more limited interpretation of "the business of insurance." They contend that because "the business of insurance" includes only "that which [insurers] undertake *uniquely* within the business of insurance," Hovenkamp Br. 9 (emphasis added), and that because exclusivity provisions "are in no way unique to the insurance industry," they are not "the business of insurance," Appellant's Br. 45-47. In other words, "the business of insurance" encompasses only "insurance-specific" practices, not commercial practices used across industries. Hovenkamp Br. 9. That narrower definition has no basis in the text. The Act exempts "the business of insurance"—*i.e.*, commercial transactions involving insurance—without the added requirement that these transactions be *unique* to the insurance industry.[7]

[7] An "insurance-specific" test is also unworkable. Would, for example, a broker's commission-based compensation be sufficiently "insurance-specific" because that commission is based on insurance renewals? Or not, because performance-based commissions are not unique to the insurance industry? Many other industries determine compensation in whole or in part on a commission basis for sales completed.

Amici contend that their "insurance-specific" requirement follows from *Group Life & Health Insurance Co. v. Royal Drug* and *Union Life Labor Insurance Co. v. Pireno*. Those cases, however, involved outsiders—third parties involved in the provision of health care versus those involved in the underwriting or selling of insurance. *Royal Drug* involved an insurer's agreements with pharmacies to allegedly fix retail drug prices. 440 U.S. 205, 207 (1979). Similarly, *Pireno* involved an agreement with a board of chiropractors, which allegedly eliminated price competition among chiropractors. 458 U.S. 119, 122-23 (1982). It is this feature of *Royal Drug* and *Pireno* that explains why the Supreme Court found it useful to ask whether the practice at issue (with the outsider) was sufficiently related to the business of insurance, either because it had "the effect of transferring or spreading a policyholder's risk" or was "an integral part of the policy relationship between the insurer and the insured." *Pireno*, 458 U.S. at 129). And even in those cases, neither consideration was dispositive. *Id.*[8]

Such *ad hoc* considerations add little in a case such as this one, where the conduct at issue is the distribution of insurance itself. Of course the way in which an insurer

[8] Relatedly, Appellant and *amici* repeat *Royal Drug*'s empty truism that the Act exempts "the business of insurance" and not "the business of insurers." Appellant's Br. 22, 25, 47; Hovenkamp Br. 2-3, 8 (quoting *Royal Drug*, 440 U.S. at 211). That might have been a helpful construct in *Royal Drug*, which again involved agreements with pharmacies. But in cases involving only players in the insurance market (*e.g.* underwriters, brokers, or agents), the distinction between the "business of insurance" and the "business of insurers" begins to collapse. Here, for example, the means of selling insurance (through exclusive agents) is both fundamental to the insurance transaction and a feature of the insurer's business model.

chooses to distribute insurance affects the spreading of risk and is, therefore, necessarily integral to the policy relationship between the insurer and the insured, as the District Court already recognized. *See* Dismissal 15-16, ECF 113 (noting "services provided by Florida Blue's brokers go directly to the allocation and spreading of risk" and are "an integral part of the policy relationship"). The policy relationship is created *via* the exclusive agents. Appellant's mistaken notion that "[a]t most" the exclusivity requirement is a "business practice that enables Florida Blue to increase its profits by preventing a rival from competing for customers," Appellant's Br. 27, ignores that this "business practice" directly affects the types of agents that Florida Blue will attract to sell its products, the training and other support Florida Blue will be willing to provide those agents, the sorts of customers Florida Blue will reach, and ultimately the insurance policies that it will sell. The make-up of Florida Blue policyholders is necessarily influenced in large measure by the firm's chosen selling strategy and is thus a key driver of its decision to operate through exclusive agency arrangements versus independent brokers. Florida Blue is not merely "preventing a rival from competing for customers." *Id.* It is also creating a distribution channel for individual insurance.

"The business of insurance" necessarily encompasses the insurer's chosen means of distributing insurance policies, including any exclusivity requirements with agents. That interpretation is consistent with *Federal Trade Commission v. National Casualty Co.*, for example, where the Supreme Court concluded that insurers' advertising practices were "the business of insurance" and therefore exempted from federal scrutiny. 357

U.S. 560, 565 (1958). It is also consistent with *Securities Exchange Commission v. National Securities, Inc.*, where the Supreme Court summarized that insurers are engaged in "the business of insurance" when conduct involves "[t]he selling and advertising of policies," "the licensing of companies and their agents," and even "the fixing of rates." 393 U.S. 453, 459-60 (1969).[9] Finally, it is consistent with the origins of the Act itself. Rolling back *South-Eastern Underwriters*, Congress necessarily had the *South-Eastern Underwriters* facts in mind—including the agreements between insurers and agents—when excluding "the business of insurance." *See Sanger Ins. Agency v. HUB Int'l Ltd.*, 802 F.3d 732, 744 (5th Cir. 2015) (noting courts of appeals have generally inferred that the insurer-agent relationship is "the business of insurance" in light of *South-Eastern Underwriters*). Nothing in *South-Eastern Underwriters* suggests that practices between insurers and insurance agents are exempt only if "unique" to insurance. Not even *Pireno* or *Royal Drug* support an "insurance-specific" requirement. After all, the transfer or spreading of risk—the first criteria identified in those cases to define "the business of insurance"—is a

[9] The Third Circuit attempted to distinguish *National Securities* in *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 360-61 (2010). It observed that *National Securities* implicated only the first clause of § 1012(b)—that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating *the business of insurance*…." It asserted that the identical language in § 1012(b)'s second clause—that "the Sherman Act … shall be applicable to *the business of insurance* to the extent that such business is not regulated by State law"—was more limited. *Id.* There is no reason to interpret identical language used in such close succession to mean something different in *National Securities* from what it means here. The "business of insurance" takes on the same meaning in both cases. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 33-34 (2005).

common feature in all sorts of contracts for sale and hire across industries, with key terms intended to allocate the risk of loss.

The narrow conception of "the business of insurance" as only that which is "unique" to insurance is at odds with McCarran-Ferguson in another way. The Act restored the States as the primary regulators of the insurance industry and, accordingly, today's state regulatory regimes are expansive. They cover a wide range of conduct that is not itself "insurance-specific" or "unique" to the insurance industry. For example, Florida regulates the licensure and registration, testing, and continuing education of insurance agents. *See*, *e.g.*, Fla. Stat. Ann. §§ 626.025, 626.0428(3)-(4), 626.112, 626.221, 626.2815, 626.8311. It regulates the name insurance agencies may use, *id.* § 626.602, the materials they may use in to sell insurance, *id.* § 626.9531(1), the information certain agents must gather from potential customers, *id.* § 626.8373(1), and reporting requirements when an insurer terminates an agent, *id.* § 626.511(1), among myriad other regulations. That regulated conduct (licensure, testing, reporting, marketing, and so forth) is not unique to the insurance industry. Federal law should not be interpreted to supersede Florida's comprehensive regulatory regime merely because the conduct at issue is not practiced *uniquely* or *only* by those in the insurance market, as *amici* would have it.

As the Supreme Court cautioned in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2003), courts ought not ignore that existing regulatory structure. In *Trinko*, the Telecommunications Act of 1996 already imposed a web of duties on established telephone companies. *Id.* at 402. Similarly, federal law here

charges the States with creating regulatory regimes governing the business of insurance, 15 U.S.C. § 1012(a), which Florida has done. For example, Florida already penalizes insurers or insurance agents who unlawfully "[e]nte[r] into any agreement to commit, or by any concerted action committing, any act of boycott, coercion, or intimidation resulting in, or tending to result in, unreasonable restraint of, or monopoly in, the business of insurance." Fla. Stat. Ann. § 626.9541(1)(d); *see also id.* § 626.9521 (penalties). With such regulatory structures already in place, any "additional benefit to competition provided by [federal] antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." *Trinko*, 540 U.S. at 412; *see also*, *e.g.*, *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 283 (2007) (concluding that "where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden" and "where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways," allowing such suits "would threaten serious harm to the efficient functioning of the securities markets").

Indeed, *Trinko* is relevant in yet another way. That case affirmed that no firm is under an antitrust duty to aid its competitors, with only a few exceptions not relevant here. *See id.* at 410-11 (discussing "essential facilities" doctrine where a firm might dominate ports or railroads or other alternative means of accessing a market). Just as the incumbent carriers in *Trinko* had no additional antitrust obligation to make their networks available to new competitors on more favorable terms, Florida Blue is not

obligated to make available its insurance agents to competitors. Florida Blue may offer exclusive contracts to any agency that is willing to accept its terms, and any other competitors including Oscar are entitled to adopt similar exclusivity arrangements if they choose. But what Oscar cannot do is require Florida Blue, as a matter of federal antitrust law, to share the network of agents that Florida Blue has trained and supported, at significant cost, to distribute its individual insurance products.

B. This Court and others have already held that exclusivity requirements in insurance sales are "the business of insurance."

For the foregoing reasons, there is no need to contort the statutory text as Appellant and *amici* ask the Court to do. The District Court correctly held that Florida Blue's exclusive agency arrangement is "the business of insurance." As the District Court acknowledged, "The Act does not exempt all activities undertaken by insurance companies," but "[t]he relationship between the insurer and its brokers is at the core of the business of insurance—that is, spreading risk." Dismissal 5, 15, ECF 113. And because that exclusive relationship "is fundamental to the type of policy which could be issued, its reliability, interpretation, and enforcement," it is "the business of insurance." *Id.* at 15; *see also id.* at 8 ("consumers rely on Florida Blue's brokers as expert personal insurance advisors, and indeed Florida law recognizes the brokers as the client's fiduciary"). That holding is both informed by the text and history of the Act and consistent with precedent.

The District Court's ruling adheres to *Thompson v. New York Life Ins. Co.*, 644 F.2d 439 (5th Cir. 1981), binding under *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). *Thompson* involved a contract precluding an agent from engaging in business other than selling insurance for the insurer. *Id.* at 441. In exchange, the agent received "incentives, beyond the usual agency relationship" and was encouraged to "focus all his entrepreneurial skills solely on selling insurance." *Id.* at 444. *Thompson* held that this exclusivity requirement was the business of insurance: "Such activity, whatever its merit, is within the business of insurance." *Id.* Appellant quibbles with *Thompson* because *Thompson* "did not involve a challenge to the type of exclusivity practices at issue here." *See* Appellant's Br. 32. But there is no basis to conclude that *Thompson*'s contractual provision is "the business of insurance" and Florida Blue's is not. The two are one in the same. The provision in *Thompson* prevented the insurance agent from selling insurance for another insurer, 644 F.2d at 441, just as Florida Blue's exclusivity provision does. In both cases, the insurer seeks the agent's undivided attention because, without it, the insurer would not rationally offer the "incentives, beyond the usual agency relationship." *Id.* at 444; *see infra*, p. 22 (describing Florida Blue's training and marketing investment). *Thompson* cannot be reconciled with the result Appellant seeks here.

To rule for Appellant, this Court would also have to depart from the Fifth Circuit's decision in *Sanger Insurance Agency v. HUB International, Ltd.*, 802 F.3d 732 (2015). *Sanger* involved an insurance program through a veterinary association. *Id.* at 734. The program offered different insurance policies underwritten by various companies, but all

through a single broker (HUB). *Id.* A competing broker (Sanger) sued after the participating insurance companies refused to also sell insurance through Sanger; indeed, four of the participating companies stated "they had an exclusive arrangement with HUB" that precluded them from selling through Sanger, even for other associations not part of HUB's program. *Id.* at 735-36. The Fifth Circuit affirmed that the insurers' exclusive arrangement with HUB was "the business of insurance" and that excluding Sanger was not an impermissible "boycott" under the McCarran-Ferguson Act. *Id.* at 744-47; *accord Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928, 932 (9th Cir. 1983) (medical association's use of "a single insurance broker for all of its members in order to assure coverage for certain high-risk specialties, thereby distributing risk across the membership" is the business of insurance). Appellant again attempts to distinguish Florida Blue's exclusivity requirement (applying to the sale of individual insurance policies) from those in *Sanger* (involving the sale of group insurance policies). *See* Appellant's Br. 37-38. Appellant appears to believe that the means an insurer chooses to sell *individual* insurance policies is not "the business of insurance," but the selling of *group* policies is. In support of that theory, Appellant spends pages contrasting the effect on risk pools, how risk is transferred, and newer Affordable Care Act requirements for individual insurance. *See id.* at 37-40. The statutory question is not so complex. It is simply whether the means by which an insurer chooses to sell insurance—through exclusive arrangements versus independent brokers—constitutes "the business of insurance." If the exclusive arrangement between the brokers and the insurers in *Sanger* was "the business

of insurance," then the inescapable conclusion is that the exclusive arrangement between Florida Blue and its agencies is too.

When a single insurer decides to use exclusive agency arrangements to distribute its policies and when that insurer-agent relationship is regulated by the State, the exclusivity requirement is immune from Sherman Act scrutiny unless an "act of boycott, coercion, or intimidation." 15 U.S.C. §§ 1012(b), 1013(b).

II. The Exclusive Agency Arrangement, A Vertical Agreement With Procompetitive Advantages, Is Not "Coercive."

The second question presented—whether Florida Blue's exclusive agency arrangement is "coercive" and thus within the Act's exception for "act[s] of boycott, coercion, or intimidation"—is even simpler. The alleged wrongdoing is nothing more than a vertical arrangement between an insurer and agencies who agree *ex ante* to distribute insurance exclusively on the insurer's behalf. Florida Blue makes no secret of its exclusivity requirement, as Appellant's complaint admits. *See* Compl. ¶ 53, ECF No. 75. The website plainly states, "Our appointment to sell individual products is an exclusive contract …." *Id.*

Such a vertical arrangement would warrant little, if any, antitrust scrutiny if this were the ordinary case proceeding under the Sherman Act. The Supreme Court has repeatedly cautioned that the *per se* rules for horizontal agreements or other cartel-like activity do not apply to vertical arrangements. *See*, *e.g.*, *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 896-97 (2007) (rejecting that vertical arrangement was *per se*

unlawful even though it had the effect of increasing prices); *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977); *see also* Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 135 (1984) ("No practice a manufacturer uses to distribute its products should be a subject of serious antitrust attention.").

It follows that the exclusivity requirement warrants even *less* scrutiny here. This is not the ordinary antitrust case. Because it involves "the business of insurance," the McCarran-Ferguson Act's even narrower exception applies. That exception does not encompass all unreasonable "restraint[s] of trade" and is instead specific to "act[s] of boycott, coercion, or intimidation." *Compare* 15 U.S.C. § 1, *with id.* § 1013(b). So even if the exclusivity requirement were "anticompetitive"—it is not—that alone would not exclude it from McCarran-Ferguson immunity

Appellant and *amici* disagree. They ignore the vertical nature of the agreement at issue and its potential benefits. Broadly defining "coercion," *amici* contend Florida Blue's exclusivity requirement is coercive just as "refusing to sell the part unless the counterparty refrains from dealing with competing firms or potential future competitors" is coercive. Hovenkamp Br. 22. It is difficult to understand how any exclusivity provision would survive under *amici*'s rule.

Contrary to *amici*'s limitless conception, the Act's "coercion" exception demands more than the exercise of economic power. Coercion occurs only "where the relation of the parties is such that one is under subjection to the other, and is thereby constrained to do what his free will would refuse." "Coercion," BLACK'S LAW DICTIONARY (3d ed.

1933); "Coercion," WEBSTER'S NEW INT'L DICTIONARY 519 (2d ed. 1934) ("the application to another of such force…as to constrain him to do against his will something he would not otherwise have done"); *see also* "Coercion," BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added) ("the *improper* use of economic power" (emphasis added)).[10] Cartel-like activity, such as the *South-Eastern Underwriters* conspirators' refusal to do business with merchants insured by non-conspirators, could be evidence of such coercion. But one firm's enforcement of an exclusivity provision in an agency contract freely entered into by the contracting parties is not.

What coercion requires was well captured in *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971), which involved the related concept of economic duress. In *Austin*, after negotiations for a new contract between a subcontractor (Austin) and a government contractor (Loral) went south, Austin threatened to stop delivery of goods to Loral on their *existing* contract unless and until Loral agreed to pay more. *Id.* at 534-35. In short, because Austin could not obtain the terms it wanted on the *new* contract, Austin changed the pricing terms of the parties' *existing* contract mid-way through performance of that contract. *Id.* Loral, "deprived…of its free will," acceded because it

[10] Appellant appears to include any exercise of monopoly power under the Act's coercion exception: "Conduct becomes coercive, and thus anticompetitive, when a monopolist's power makes it an indispensable trading partner and other actors have no realistic choice but to accede to terms they would not otherwise accept." Appellant's Br. 49. As even *amici* acknowledge, not all anticompetitive or monopolistic behavior is "coercive," lest the Act's exception "swallow its rule." Hovenkamp 21-22. And here, there is no reason to assume that Florida Blue is a monopolist. *Infra*, pp. 23-24.

could not cover using another subcontractor and still meet its own commitments. *Id.* at 534-36. That was an improper use of economic force, as Chief Judge Fuld explained:

> A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will. The existence of economic duress or business compulsion is demonstrated by proof that "immediate possession of needful goods is threatened" or, more particularly, in cases such as the one before us, by proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand.

Id. at 535 (citations omitted). As *Austin* recognizes, there are no efficiency advantages by bludgeoning one party to enter into a contract by threatening to breach another.

There is of course no hint of any such threat, undue pressure, loss of "free will," or "some further demand" in this appeal. An insurance agency freely accepts Florida Blue's terms (or freely rejects them to work exclusively for another insurer or independently). The enforcement of those terms, once accepted, cannot alone be coercive. Florida Blue's exclusivity requirements are open and obvious. *See* Compl. ¶ 53, ECF No. 75. It has not duped insurance agencies or their agents into working exclusively for them; that has been part of Florida Blue's model for decades. *See* Tant Decl. ¶ 9, ECF No. 62-1.

There is no basis to presume that such a vertical agreement is anticompetitive under a traditional antitrust analysis, let alone an "act of boycott, coercion, or intimidation" required by McCarran-Ferguson. The arrangement creates efficiencies and offers other procompetitive benefits. The promise of exclusive agency permits Florida Blue to make significant upfront and continuing investments in its network of agents. Florida Blue hosts annual roadshows, conferences, and meetings to train and educate agents, in addition to day-to-day job aids and talking points to help answer customer questions. *See* Tant Decl. ¶¶ 18-19, ECF No. 62-1. Between 2016 and 2019, Florida Blue spent $6 million on rewards programs for agencies to put toward advertisements, marketing, sponsorships, and other promotional material. *Id.* at ¶ 21. Florida Blue also supports agents with various tools (such as "county placemats" and "web-based sales tools" and estimators) to identify likely customers. *Id.* at ¶ 20. Only with the assurance of exclusivity would Florida Blue be willing to make such substantial investments in its agents; without exclusivity, its competitors could free-ride on those investments and Florida Blue would reasonably pull back its efforts. *See* Baker Decl. ¶ 16, ECF No. 62-3 (exclusivity enables "significant investments" in "training, education, health clinics and claims centers," "improv[ing] the quality of the services and the information available to health care consumers" while "preventing free riding" by competitors).

In light of these advantages, it makes little sense to equate that vertical arrangement with the horizontal, cartel-like arrangements in other insurance cases. In *In re Insurance Brokerage Litigation*, for example, the Third Circuit faced much different facts: a

horizontal agreement among brokers to steer insurance customers to particular insurers, who then agreed not to compete by offering better pricing when insurance was renewed. 618 F.3d at 308, 357-58. Likewise, in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 535 (1978), insurers agreed not to compete for potential customers who were previously insured by St. Paul. And in *South-Eastern Underwriters*, the Court emphasized the "*combinations* of insurance companies" that were "coerc[ing], intimidat[ing], and boycott[ing] competitors and consumers." 322 U.S. at 562 (emphasis added). Such collective refusals to deal bear little resemblance to the facts here.

Finally, there is no reason to assume that Florida Blue's vertical arrangement is "coercive" merely because of Florida Blue's market share. Florida Blue is not a monopolist, despite Appellant's and *amici*'s unsupported assertions to the contrary.[11] There are roughly 146,000 licensed agents in Florida. *See* Baker Decl. ¶ 60, ECF No. 62-3. Nothing stops a competitor from drawing away Florida Blue's fraction of those licensed agents by offering higher commissions or other incentives. Nor does anything stop an agency from refusing Florida Blue's exclusivity requirement and remaining independent so that agents may continue selling other insurance policies. And from the consumers'

[11] *Amici* repeatedly, but incorrectly, refer to Florida Blue as a monopolist, contend that Florida Blue will "exert its alleged *monopoly power* to force brokers to write *only* Florida Blue policies," and conclude that "an insurance broker would have *no reason* to refuse to sell Oscar's policies" absent such "coercion." Hovenkamp Br. 24 (emphases added); *see also id.* 2, 5, 18; Appellant's Br. 49-51. There are of course various reasons why agencies agree to Florida Blue's exclusivity requirement absent "coercion," not the least of which is the training and marketing support Florida Blue offers in exchange for exclusivity.

perspective, there are numerous distribution channels for individuals and families to purchase health insurance from various insurers. Floridians can purchase health insurance through Healthcare.gov, the federal marketplace call center, direct company sales online or over the phone, or through intermediaries that include not only exclusive agents but also web-brokers, "Navigators,"[12] or independent brokers. *See id.* at ¶ 15; *see also id.* at ¶ 205 (more than 35% of individual insurance policies were sold without use of intermediaries in Florida in 2018 open-enrollment period).

The current landscape of Florida's insurance market resembles what one would expect to see in any competitive market—a mix of exclusive and non-exclusive arrangements. There is no dominant solution because each has trade-offs. For example, an insurer's desire to have a highly trained and coordinated network of agents favors exclusivity, while another insurer's desire to reach a broader market with a larger network of agents favors non-exclusivity. No one solution is better than the other, and no one solution is presumptively lawful and the other not. And when vertical arrangements such as Florida Blue's are not only lawful but also have procompetitive effects, those ought not be deterred by the threat of costly antitrust litigation.

Appellant seeks little more than a ruling that Florida Blue must assist or subsidize competitors. In Appellant's view, Florida Blue may offer the same training or rewards to agents but does so at the risk of an antitrust suit for treble damages if, in exchange,

[12] *See* Fla. Stat. Ann. § 626.995 *et seq.* ("navigators" facilitate insurance purchases through federal or state exchanges under the Affordable Care Act).

Florida Blue requires the assurance of exclusivity. If "coercion" is so broadly defined to include such exclusivity requirements, how will insurers react? Agents will receive less training, less marketing support, less knowledge of the insurer's products, and ultimately lowered success in the sale of those products. Perhaps the insurer's competitors are better off, but the consumer is not. That is not a procompetitive result. It is the use of the antitrust laws as a sword to help competitors, rather than competition itself.

CONCLUSION

The antitrust laws are designed to preserve competitive markets. They are not designed to insulate competitors from otherwise lawful, often procompetitive, activity. For the foregoing reasons, this Court should affirm the judgment of the district court and hold that Florida Blue's exclusive agency arrangement is "the business of insurance" and anything but "coercion."

February 25, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1) and Circuit Rules 29-2 and 28-1(m), the undersigned hereby certifies:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,438 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32-4.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

February 25, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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